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No. 94-2048

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1995

KAYNO M. REED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED SERVICES

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's rights under the Due Process Clause of the Fifth Amendment were violated by the fact that the investigation that resulted in petitioner's court-martial for raping a female sailor lasted 20 months.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Armed Forces (Pet. App. 1a-10a) is reported at 41 M.J. 449. The opinion of the Navy-Marine Corps Court of Military Review[1] (Pet. App. 27a-49a) is unreported. The General Court-Martial ruling on the defense motion to dismiss (Pet. App. 50a-55a) is also unreported.

JURISDICTION

The judgment of the Court of Appeals for the Armed Forces was entered on March 22, 1995. The petition for a writ of certiorari was filed on June 14,

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[1] Now the Navy-Marine Corps Court of Criminal Appeals.

1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Petitioner is charged, at a general court-martial, with raping a female student. The military judge granted petitioner's motion to dismiss, finding a pre-accusation delay in violation of the Due Process Clause of the Fifth Amendment. The Court of Military Review reversed, ordering the charges reinstated. The court of appeals affirmed. Pet. App. 2a.

1. In November 1991, a group of sailors, including petitioner, were undergoing apprenticeship training at the Naval Training Center (NTC) in Orlando, Florida. They attended a weekend party at a civilian hotel. At the party Seaman X was raped twice after she had passed out in a hotel room. Seaman X did not immediately report the crime to anyone in authority. Rather, in January 1992, she informed her husband of the incident after the couple watched a movie in which a woman was raped. Her husband, also on active duty in the Armed Forces, reported the offense to his command chaplain who, in turn, contacted the Naval Criminal Investigative Service (NCIS) in San Diego. Pet. App. 2a-3a.

On March 13, 1992, the NCIS requested information from naval authorities in Orlando relating to Seaman X's allegations. At that time, Seaman X could identify her attacker only as a black male named "Reed" who had been in a Navy school in Orlando at the time of the incident. Pet. App. 3a, 29a. The NCIS accordingly requested rosters from NTC of those students who had attended apprenticeship training during the same period as Seaman X. On March 31, 1992, NCIS received the rosters. On April 27, 1992, after review-

ing the rosters, Seaman X identified "Kayno Reed" (petitioner) as her attacker, and also informed NCIS of the names of five additional witnesses. NCIS thereupon sent inquiries to six locations, including one to Mayport, Florida, that requested petitioner's photograph and fingerprints. Shortly thereafter, NCIS learned that petitioner and one of the witnesses whom Seaman X had identified, Fireman Apprentice McElroy, had already deployed with their ships. Pet. App. 3a, 29a-30a.

NCIS San Diego then directed its field offices to interview the five witnesses identified by Seaman X. Those witnesses had undertaken different duty assignments around the United States; in addition, one had left the Navy, and another had been absent without authorization for almost five months. During the next three and one-half months, NCIS interviewed each of the five witnesses. NCIS San Diego received the last report of the five interviews on August 10, 1992. Pet. App. 3a, 30a-34a.

On August 24, 1992, NCIS received petitioner's photographs and fingerprints. On October 28, 1992, shortly after Seaman X had returned from a naval deployment, she participated in a photographic lineup arranged by NCIS, and identified petitioner as her attacker. Pet. App. 34a. Two days later, NCIS San Diego directed agents in Mayport, Florida, to attempt to interrogate petitioner. On November 19, 1992, NCIS agents in Mayport advised petitioner of his right to remain silent and requested an interview, but petitioner invoked his right to remain silent. On December 8, 1992, NCIS completed its investigation and forwarded a copy of its report to petitioner's commanding officer. Pet. App. 3a, 34a-35a.

On January 13, 1993, petitioner's commanding officer requested a follow-up interview of McElroy to determine if he could identify other individuals in the hotel room on the night of the alleged rape. On May 6, 1993, NCIS interviewed McElroy by telephone, but he was unable to provide additional information. Pet. App. 4a.

On September 4, 1993, petitioner was informed that he was being involuntarily extended on active duty, pending resolution of the investigation. On September 24, 1993, the rape charges and specifications were preferred against petitioner. On October 5, 1993, petitioner's commanding officer, a summary court-martial convening authority, received the charges. On October 8, 1993, an investigation under Article 32 of the Uniform Code of Military Justice, 10 U.S.C. 832, was conducted to determine if there were reasonable grounds to proceed to trial. On October 21, 1993, the Article 32 investigation was completed, and the investigating officer recommended trial by general court-martial. On November 23, 1993, petitioner's command forwarded the case to the general court-martial convening authority (GCMCA). On January 7, 1994, the GCMCA's staff judge advocate completed his review, concurring in the recommendation to refer charges to a general court-martial. On January 10, 1994, the charges were referred to a general court-martial. Pet. App. 4a, 35a-36a.

2. At trial, petitioner claimed that the delay in bringing the charges against him had denied him his right to due process under the Fifth Amendment. The military judge agreed and dismissed the charges. He noted that 20 months had passed between NCIS's having learned of Seaman X's allegations in January

1992 and its preferral of the charges in September 1993. That delay, the judge held, denied the defense the opportunity to question witnesses "at a time when their memory would be fresh," resulting in actual prejudice to petitioner. Pet. App. 50a-51a. The judge found that petitioner had suffered prejudice because, beginning in September 1993, he had been forbidden to return to civilian life. *Id.* at 51a-52a. While acknowledging the government's limited resources, its right to perfect its case before preferral of charges, and the need to accommodate the investigation to other naval interests, the judge found that the 20-month delay was unjustified, given that the investigation had "quickly narrowed to one suspect." *Id.* at 54a.

3. The Navy-Marine Corps Court of Military Review (the Navy Court of Review) reversed. Pet. App. 27a-49a. The military judge, it held, had misapplied *United States* v. *Marion*, 404 U.S. 307 (1971), and *United States* v. *Lovasco*, 431 U.S. 783 (1977), which require a defendant claiming pre-indictment delay to establish both actual prejudice resulting from the delay and intentional tactical delay by the government. The court found no actual prejudice. It noted that the military judge's concern about witnesses' fading memories had been based solely on witness McElroy's statement that he could no longer remember the identity of persons who had entered the hotel room with petitioner the night of the alleged rape. Reliance on that fact was misplaced, the court held, because petitioner had neither asserted that he was unaware of the identity of any such persons, or that any such person could provide information helpful to petitioner's defense. Pet. App. 43a-45a. Moreover,

like the defense, the government had been unable to interview witnesses until many months after the date of the alleged incident. Finally, the fact that petitioner had been held on active duty since charges had been preferred against him was irrelevant to the prejudice inquiry, because it did not relate to "the accused's ability to present a defense to the charges against him." *Id.* at 45a. The court also found the 20-month period between notice of the offense and preferral of charges justified, noting the magnitude of NCIS's efforts to conduct a thorough investigation and the fact that potential witnesses were "literally, spread around the world." *Id.* at 46a. Thus, the delay resulted from legitimate investigative reasons, and was not "undertaken to gain a tactical advantage over the accused." *Id.* at 47a.

4. The United States Court of Appeals for the Armed Forces affirmed. Pet. App. 1a-10a. The "primary guarantee" against pre-accusation delay, it noted, is the statute of limitations governing the offense. *Id.* at 5a (quoting *Marion*, 404 U.S. at 322). Like the Navy Court of Review, the court held that a pre-accusation delay violates the Due Process Clause only when the delay produces actual prejudice, and when the prosecution has acted in "reckless disregard" of an "appreciable risk that delay would impair the ability to mount an effective defense." *Id.* at 6a (quoting *Lovasco*, 431 U.S. at 795 n.17). The court held that petitioner had shown neither egregious or intentional tactical delay, nor actual prejudice. The investigation had been delayed because it encountered difficulties "coordinating the location of witnesses throughout the world," the court noted, and the preju-

dice to petitioner was minimal and "did not involve lost witnesses or physical evidence." Pet. App. 8a.[2]

ARGUMENT

Petitioner claims (Pet. 8) that the court of appeals and the Navy Court of Review below utilized an incorrect standard to evaluate his claim of unconstitutional pre-accusation delay. Petitioner also claims (Pet. 6-9) that this Court should grant the petition for a writ of certiorari in order to resolve a split among the federal and state courts of appeals as to the correct standard to apply to such claims. While petitioner is correct that a circuit split exists on that question, this case is an unsuitable vehicle for resolving that conflict. Moreover, the standard applied by the court of appeals was correct in light of this Court's precedents.

1. As the court of appeals noted (Pet. App. 7a & n.1), most federal courts have held that a defendant claiming pre-indictment delay must establish both that the delay caused the defendant actual prejudice and that the delay was the product of intentional governmental attempt to gain a tactical advantage over the defense. See, *e.g.*, *United States* v. *Byrd*, 31 F.3d 1329, 1339 (5th Cir. 1994), cert. denied, 115 S. Ct. 1432 (1995); *Perez* v. *Sullivan*, 793 F.2d 249, 259 (10th Cir.), cert. denied, 479 U.S. 936 (1986); *United States*

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[2] Chief Judge Sullivan dissented, arguing that the majority and the court of military review had failed to review the military judge's ruling under an abuse-of-discretion standard. Pet. App. 9a (Sullivan, C.J., dissenting). He stated, without elaboration, that the record did supply "some evidence of legally cognizable prejudice and 'egregious or intentional' government conduct." *Id.* at 10a (Sullivan, C.J., dissenting).

v. *Amuny*, 767 F.2d 1113, 1119 (5th Cir. 1985); *United States* v. *Swacker*, 628 F.2d 1250, 1254 (9th Cir. 1980); *United States* v. *Comosona*, 614 F.2d 695, 696 (10th Cir. 1980). As petitioner notes (Pet. 7), however, several courts of appeals have held that, upon a showing by the defense of actual prejudice, the burden shifts to the government to demonstrate legitimate reasons for the delay. Those courts have typically further held that the reasons for the delay must outweigh the prejudice to the defendant. See, *e.g.*, *Howell* v. *Barker*, 904 F.2d 889, 895 (4th Cir.), cert. denied, 498 U.S. 1016 (1990); *United States* v. *King*, 593 F.2d 269, 272 (7th Cir. 1979); *United States* v. *Valentine*, 783 F.2d 1413, 1416-1417 (9th Cir. 1986). See also *Hoo* v. *United States*, 484 U.S. 1035 (1988) (White, J., dissenting from the denial of certiorari) (noting circuit conflict).[3] Petitioner urges (Pet. 8-9) that the court of appeals erred in applying the former, not the latter, standard in this case, and that the government should have been required to establish legitimate reasons for waiting 20 months after Seaman X's allegations to charge petitioner with the rape.

This case is an ill-suited one in which to resolve the circuit conflict identified by petitioner, for two

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[3] In *United States* v. *Crouch*, 51 F.3d 480 (5th Cir. 1995), a panel concluded that Fifth Circuit precedents required the application of the balancing test described in text. Judge Garwood dissented from that holding, arguing that Fifth Circuit precedents actually required the defendant to establish both actual prejudice and intentional delay by the prosecutor to gain a tactical advantage. *Id.* at 485-486 (Garwood, J., dissenting). On June 14, 1995, the Fifth Circuit granted rehearing en banc to address the issue.

reasons. First, even if the legal standard endorsed by petitioner had been used in this case, petitioner would not prevail. That is because, as both the court of appeals and the Navy Court of Review held, petitioner has not demonstrated that he suffered actual prejudice from the 20-month delay in prosecution. And under the standard favored by petitioner, a showing of actual prejudice is a threshold requirement for an inquiry into the government's reasons for delay.

As the appellate courts below observed, the military judge's finding of actual prejudice was based essentially on speculation that the passage of time before charges were filed against petitioner would cause witnesses' memories to fade. See Pet. App. 8a (citing *id.* at 43a). As those courts noted, however, the sole example offered by the military judge was the possibility that the delay would make it impossible for the defense to identify witnesses who might have been in the hotel room at or around the time of the alleged rape. As the Navy Court of Review held, that possibility supplied an insufficient basis for a finding of actual prejudice, for several reasons. First, petitioner himself had never claimed that such witnesses possessed exculpatory evidence, and indeed had never claimed that he was unable to identify the persons present in the room. Pet. App. 44a-45a; *id.* at 45a ("there is not the slightest indication in the record of how the individuals would provide exculpatory evidence); see also *id.* at 8a n.2. Moreover, the NCIS investigators had themselves made extensive efforts to locate and interview the persons believed to have been in the room on the night of the alleged rape, and there was no basis for speculating that an earlier preferral of charges would have resulted in the iden-

tification of additional witnesses. *Id.* at 45a; compare *Lovasco*, 431 U.S. at 788 n.6 (noting lower court's rejection of pre-indictment delay claim where defendant did not assert that missing witness would provide exculpatory evidence).

The military judge also based his finding of actual prejudice on the fact that, based on NCIS's investigation, petitioner had been involuntarily extended on active duty beginning in September 1993. As the Navy Court of Review noted, however, that fact is irrelevant to the actual-prejudice inquiry, which instead focuses on whether pre-indictment delay has hindered the defendant's ability to present an effective defense at trial. See *Marion*, 404 U.S. at 325 (noting that "[n]o actual prejudice *to the conduct of the defense* [has been] alleged or proved") (emphasis added); cf. *Lovasco*, 431 U.S. at 788-790. As the Navy Court of Review put the point:

> The form of prejudice with which the Court was concerned in *Marion* and *Lovasco* was the accused's ability to present a defense without being substantially hampered by a lapse of time. In other words did the passage of time cause evidence to be lost, memories of witness[es] to be impaired, or loss of witnesses altogether.

Pet. App. 41a (brackets added) (quoting *United States* v. *Reeves*, 34 M.J. 1261, 1263 (N.-M.C.M.R. 1992)).[4]

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[4] Petitioner's claim would also fail under the standard he favors because, as the court of appeals held, the government did demonstrate legitimate reasons for delay: "the difficulties [of] coordinating the location of witnesses throughout the world." Pet. App. 8a. While the court of appeals did not explicitly balance the government's interest in investigative thoroughness

Apart from the fact that petitioner's claim of pre-indictment delay would fail under either of the standards utilized by the courts of appeals, this case is also unfit for review because petitioner's claim is premature. Petitioner has not yet been tried on the rape charges. If he is acquitted, his claim that pre-accusation delay actually prejudiced his ability to obtain a fair trial will be mooted. If he is convicted, petitioner will retain the right to challenge the pre-accusation delay, including, ultimately, by seeking review in this Court. A post-trial examination of petitioner's claim is preferable to the interlocutory review that petitioner seeks, because it would afford reviewing courts the opportunity to examine petitioner's claims of actual prejudice based on witnesses' memory loss in light of the actual proof adduced at trial.

2. While petitioner's claim of pre-indictment delay would fail under either of the standards used by the courts of appeals, the standard used in this case (requiring the defendant to prove both actual prejudice and an intentional delay to gain tactical advantage) is the more consonant with this Court's teachings. As this Court has observed, "the applicable statute of limitations * * * is * * * the primary guarantee against bringing overly stale criminal charges." *Marion*, 404 U.S. at 322 (quoting *United States* v. *Ewell*, 383 U.S. 116, 122 (1966)). The Due Process Clause therefore has only "a limited

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against the prejudice to petitioner worked by the delay, its finding that there was "minimal" prejudice (*ibid.*) implicitly recognizes that the government's reasons for delay in this case take precedence over petitioner's desire for a speedier preferral of charges.

role to play in protecting against oppressive delay." *Lovasco*, 431 U.S. at 789.

In defining that limited role, the Court has rejected the claim that prosecutors are under any duty to file indictments upon obtaining probable cause:

> It requires no extended argument to establish that prosecutors do not deviate from "fundamental conceptions of justice" when they defer seeking indictments until they have probable cause to believe an accused is guilty; indeed it is unprofessional conduct for a prosecutor to recommend an indictment on less than probable cause. It should be equally obvious that prosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt. To impose such a duty "would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself." From the perspective of potential defendants, requiring prosecutions to commence when probable cause is established is undesirable because it would increase the likelihood of unwarranted charges being filed, and would add to the time during which defendants stand accused but untried.

Lovasco, 431 U.S. at 790-791 (citation and footnotes omitted). Requiring prosecutors to file charges upon assembling evidence sufficient to establish guilt would also "preclude the Government from giving full consideration to the desirability of not prosecuting in particular cases" where, for example, a participant is shown to have played a minor role in a crime or where

mitigating factors exist. *Id.* at 794. Accordingly, the Court has held:

> Rather than deviating from elementary standards of "fair play and decency," a prosecutor abides by them if he refuses to seek indictments until he is completely satisfied that he should prosecute and will be able promptly to establish guilt beyond a reasonable doubt. Penalizing prosecutors who defer action for these reasons would subordinate the goal of "orderly expedition" to that of "mere speed." This the Due Process Clause does not require. We therefore hold that to prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time.

Id. at 795-796 (citation omitted).

In light of these considerations, the standard for gauging claims of pre-indictment delay utilized by most courts of appeals, including the court below, is correct. That standard obliges the defendant to establish not simply the existence of prejudice, but also that the delay that caused that prejudice was brought about by illegitimate governmental motivations, such as the desire to put the defense at a tactical disadvantage, and was not based on the legitimate interest in conducting further investigation. See *United States* v. *Gouveia*, 467 U.S. 180, 192 (1984). By contrast, the standard endorsed by petitioner, which puts the burden of proof on the government following a mere showing of prejudice, is at odds with *Lovasco*'s teaching that, in cases involving pre-indictment delay, prejudice alone does not establish a due process violation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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